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10 Attorneys for Plaintiffs
11 LENSCRAFTERS, INC. and EYEXAM OF
12 CALIFORNIA, INC.

13 IN THE UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 LENSCRAFTERS, INC. and EYEXAM OF
16 CALIFORNIA, INC.,

17 Plaintiffs,

18 v.
19 LIBERTY MUTUAL FIRE INSURANCE
20 COMPANY; EXECUTIVE RISK SPECIALTY
21 INSURANCE COMPANY; UNITED STATES
22 FIRE INSURANCE COMPANY; MARKEL
23 AMERICAN INSURANCE COMPANY and
24 WESTCHESTER FIRE INSURANCE COMPANY,

25 Defendants,

26 AND RELATED COUNTER- AND CROSS-
27 CLAIMS.

28 Case No.: C-07-2853 SBA

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION TO DISMISS
WITHOUT PREJUDICE CLAIMS
AGAINST DEFENDANTS LIBERTY
MUTUAL FIRE INSURANCE
COMPANY, EXECUTIVE RISK
SPECIALTY INSURANCE COMPANY
AND WESTCHESTER FIRE
INSURANCE COMPANY**

Date: April 8, 2008

Time: 1:00 p.m.

Courtroom: 3

The Hon. Sandra Brown Armstrong

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on April 8, 2008, at 1:00 p.m., in Courtroom 3 of the United
 3 States District Court, Northern District of California, located at 1301 Clay Street, 3rd Floor,
 4 Oakland, California, plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. will and do
 5 move pursuant to Fed. Rule Civ. Pro. Rule 41(a)(2) to dismiss without prejudice claims plaintiffs
 6 have filed against defendants Liberty Mutual Fire Insurance Company (“Liberty”), Executive Risk
 7 Specialty Insurance Company (“ERSIC”) and Westchester Fire Insurance Company
 8 (“Westchester”). This motion is made on the grounds that plaintiffs have entered into settlement
 9 agreements with Liberty, ERSIC and Westchester pursuant to which these defendants have
 10 consented to and contributed funds to a settlement in the underlying *Snow* action, and the parties
 11 released claims against one another. The motion is based on the memorandum of points and
 12 authorities filed herewith, the Declaration of Celia M. Jackson accompanying this motion, the
 13 pleadings and papers in this action, and on any argument to be made at the hearing.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**15 **I. INTRODUCTION**

16 Pursuant to Federal Rule of Civil Procedure 41(a)(2), plaintiffs LensCrafters, Inc. and
 17 EYEXAM of California, Inc. (together, “LensCrafters”) respectfully request that the Court enter an
 18 order dismissing without prejudice LensCrafters’ claims against defendants Liberty Mutual Fire
 19 Insurance Company (“Liberty”), Executive Risk Specialty Insurance Company (“ERSIC”) and
 20 Westchester Fire Insurance Company (“Westchester”). As described below, LensCrafters has
 21 reached a settlement with these defendants pursuant to which they consented to and contributed
 22 funds to a settlement in the underlying *Snow* action, and the parties released claims against one
 23 another. LensCrafters also agreed to file a dismissal of all claims against Liberty, ERSIC and
 24 Westchester.

25 This motion has been made necessary because defendant Markel American Insurance
 26 Company (“Markel”) has not responded to LensCrafters’ repeated requests that it sign a
 27 straightforward stipulation permitting LensCrafters to dismiss its claims against the settling
 28 insurers. Declaration of Celia M. Jackson, filed herewith, ¶ 6. Thus, in order to meet its

1 obligations under the settlement agreements, and in the interests of moving this case forward,
 2 LensCrafters requests that the Court grant LensCrafters' motion and enter the requested dismissal.

3 **II. STATEMENT OF FACTS**

4 **A. The *Snow* Settlement**

5 This lawsuit involves a dispute between LensCrafters and defendant insurers regarding
 6 indemnity coverage for a class action lawsuit entitled *Melvin Gene Snow, et al. v. LensCrafters,*
 7 *Inc., et al.*, San Francisco Superior Court Case No. CGC-02-40554 ("Snow"). The *Snow* action has
 8 been pending for nearly six years. After a year of intensive negotiations, however, including
 9 multiple mediation sessions with the Hon. Edward A. Infante (Ret.) and the Hon. Ronald M.
 10 Sabraw (Ret.), the parties in *Snow* were able to achieve a settlement. The settlement agreement
 11 covers a class of more than one million consumers and will provide a combination of cash and
 12 discount vouchers to class members. *See* Jackson Dec., ¶ 2.

13 The parties presented the *Snow* settlement to the Hon. Richard A Kramer, who is presiding
 14 over the *Snow* case, on February 4, 2008. On that date, the court granted preliminary approval of
 15 the *Snow* settlement. The final approval hearing is scheduled for July 11, 2008. *See* Jackson Dec.,
 16 ¶ 3.

17 **B. LensCrafters' Settlements with Liberty, ERSIC and Westchester**

18 As part of the settlement negotiations with the *Snow* plaintiffs, LensCrafters reached
 19 settlement agreements with three of its insurers: Liberty, ERSIC and Westchester. These insurers
 20 consented to the *Snow* settlement and each insurer agreed to provide funding for the settlement.
 21 Liberty and ERSIC's contributions have exhausted their policy limits. Jackson Dec., ¶ 4.
 22 Defendants Markel and United States Fire Insurance Company refused to participate in the
 23 settlement. *Id.*

24 The settlement agreements between LensCrafters and the settling insurers contain mutual
 25 releases. LensCrafters has also agreed to file dismissals without prejudice of its claims against
 26 these insurers immediately upon preliminary approval of the *Snow* settlement. These dismissals
 27 will become with prejudice if and when the *Snow* settlement receives final approval. Jackson Dec.,
 28 ¶ 5.

C. Markel Ignores LensCrafters' Request To Stipulate to the Dismissal of LensCrafters' Claims Against the Settling Insurers

On February 15, 2008, as required by Fed. Rule Civ. Pro. Rule 41(a)(1), LensCrafters circulated to the other parties a draft of a stipulation to dismiss its claims against Liberty, ERSIC and Westchester. After negotiations over the language of the stipulation, all defendants other than Markel agreed to execute the stipulation. Despite repeated attempts to obtain Markel's consent to the stipulation, however, Markel has not provided it. Jackson Dec., ¶ 6. Markel's failure to consent to the stipulation is inexplicable. Thus, to comply with its obligations under the settlement agreements and in the interests of moving this case forward, LensCrafters asks the Court to enter an order effectuating the dismissals.

III. CONCLUSION

For the reasons stated above, the Court should grant LensCrafters' motion to dismiss without prejudice the claims against Liberty, ERSIC and Westchester.

DATED: February 26, 2008

Respectfully submitted,

HELLER EHRLMAN LLP

By /s/ Celia M. Jackson
Celia M. Jackson

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LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.